Supreme Court, U. S.
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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1976

No. 76-788

FERN HOWLAND, MATTIE STOREY, JEANNE AMODT, ROSALIE ROE, and CONSTANCE PEREZ,
Petitioners,

vs.

CITY OF MONTEREY, a public body, corporate and politic; PETER J. CONIGLIO, JOHN M. BOULDRY, JOSEPH G. ANSEL, GERALD T. FRY, LOU RUDOLPH, each in his official capacity as a member of the City Council of the City of Monterey; JOHN H. NAIL, in his official capacity as City Manager for the City of Monterey; and HAROLD BENADOM, in his official capacity as Chief of Police of the City of Monterey,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

The above-named petitioners respectfully pray that a writ of certiorari issue to review the memorandum decision of the United States Court of Appeals for the Ninth Circuit entered in this proceeding on June 11, 1976.

OPINION BELOW

The opinion of the Court of Appeal is not reported and will not be reported pursuant to the Order of the same Court, since the opinion carries a legend "DO NOT PUBLISH". Said opinion is attached hereto as EXHIBIT "A".

JURISDICTION

The memorandum decision of the Court of Appeals for the Ninth Circuit was entered on June 11, 1976. A timely petition for rehearing was denied on August 16, 1976, and petition for certiorari was filed within 90 days of that date. This Court's jurisdiction is invoked under 42 U.S.C.A. §§2000(e) et seq.

The memorandum decision of June 11, 1976 in Case No. 74-3145, affirming the judgment of the United States District Court for the Northern District of California, Honorable Robert H. Schnacke, Judge, in favor of defendants (respondents herein) in Case No. 73-1059 RHS, became final on August 16, 1976 when the United States Court of Appeals for the Ninth Circuit denied rehearing. This statement is submitted to show that the Supreme Court of the United States has jurisdiction and that a substantial question is presented.

The complaint for relief was brought by plaintiffs (petitioners herein), five female employees of the Monterey, California Police Department, under Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C.A. §§2000(e) et seq., and the due process and equal protection clauses of the Fourteenth Amendment, against the City of Monterey and certain of its officials. The employees claim that certain employment practices of the City are unlawfully discriminatory on the basis of sex. After trial by the Court without a jury, the United States District Court for

the Northern District of California, Honorable Robert H. Schnake, Judge, rendered judgment for the defendants. The employees appealed to the Court of Appeals for the Ninth Circuit, which affirmed. The employees then petitioned for rehearing, which was denied on August 16, 1976, thus the docketing of the petition was timely.

QUESTIONS PRESENTED

1. Does the judgment of a State Court after a plenary trial bar a subsequent Title VII action?

2. Does res judicata bar claims of discrimination for acts subsequent to a State Judgment?

3. Does an employment system which denies a woman the opportunity for promotion by reason of lack of experience, which she has been denied as a condition of her employment, violate the requirements of Title VII?

STATUTE INVOLVED

The statute involved is Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C.A. §§2000(e) et seq.

STATEMENT OF FACTS

This is a sex discrimination case involving five female employees of the City of Monterey, California, who worked in the Police Department. While the discriminatory acts varied as to the different plaintiffs, they were similar and can be described by relating the experience of one, Fern Howland, who has been employed by the City for some twenty years.

Mrs. Howland had been classified as a "Policewoman" and was a sworn peace officer, who wore a uniform and carried out a variety of police duties. She was an outstanding officer, receiving high efficiency reports. She taught police science courses at the local college. She was elected President of the state-wide professional organization of women police officers. After several years, as part of a classification study, her title was changed to "Policewoman-Clerk", although her duties did not change. She was promoted to the Detective Division, where she conducted investigations, operated the Pawnshop Detail and the Photographic Laboratory.

After she had been working as a Detective for five years, she filed her original complaint of sexual discrimination in State Court. She claimed that although she had 17 years' experience as an officer and performed the same duties as her male counterparts in the Detective Division, she received less pay than a new male recruit policeman, with no experience. The State Court found that her complaint was true and ordered the City to pay her at the same rate as male police officers performing the same duties as long as she was required to perform these duties. She was awarded back pay for discriminatory treatment prior to the trial.

However, the State Court judgment did not prohibit the City from reassigning her and the City thereafter did just that, first transferring her out of the Detective Division and then transferring her out of police duties altogether.

These acts were the decisions of the Chief of Police, who was admitted to be the de facto appointing authority in all matters affecting employment and assignment.

A new action was filed, this time in Federal Court, alleging that there was illegal sex-based discrimination in the transfers, that the plaintiff was denied employment and promotion opportunities for the same reason and that the actions after the State Court judgment constituted punitive retribution. In the course of this proceeding the Chief of Police admitted that (1) Mrs. Howland would still be assigned to police duties and (2) she would still be working in the Detective Division if she had not instituted her legal action in which her claims of discrimination were confirmed. He further admitted to a strong personal bias against women engaging in police work or acting as jailers, claiming that women should not be exposed to the language of male prisoners or the dangers of police patrol work.

In claiming that the promotion and employment procedures were biased and unfair, plaintiff established that she had been denied the opportunity to take examinations for the "all-male" positions of Sergeant and Detective, although she was professionally qualified. The denial had been based on her lack of police patrol experience, which the City had refused to allow her to acquire. After the State Court judgment she was allowed to apply for the position of Sergeant on a

competitive basis. She took and passed the written examination and qualified to appear for oral interview before a qualification panel. The Chief of Police, who had outspoken bias against women as police officers and particularly against plaintiff, by reason of her successful complaint, recommended and approved the membership of the oral interview board. He sat as a voting member of the board himself. Despite his votes, rating her as unqualified in every category considered, plaintiff was rated as qualified by the board and placed on the eligible list.

The recommendations of the board were then forwarded to the selfsame Chief of Police, who had the power to select the successful applicant from the list of qualified applicants. He did not select plaintiff. Since that examination plaintiff has continued to suffer differential treatment. She is denied the opportunity to continue in police work, for which she is professionally qualified. She is denied promotion ostensibly because she does not have certain work experience, which the Chief of Police has decreed she may not have.

The defendants claimed in Federal Court that their actions since the State Court judgment were permitted by the State Court and that plaintiffs were prevented from raising and litigating these matters by reason of res judicata.

The vice of the City's procedures is that it has continued to deal with women as a class in relation to employment to their disadvantage in many ways. They are denied employment opportunity,

qualifying experience and opportunity for promotion by reason of the admitted prejudices of the appointing authority, the Chief of Police. Denial of experience or advancement opportunity has been held to be an unlawfu' employment practice. EEOC Decision No. 71-796 (1970), CCH Employment Practices Guide, para. 6189, Utility Workers Union v. So. California Edison Co. (1969 D.C. Cal.), 2 CCH EPD, para. 10133, 12 ALR Fed. 58, Rosenfeld v. So. Pacific Co. (1971 CA 9 Cal.) 444 Fed. 2d 1219, 42 U.S.C.A. §2000(e)(2), Richards v. Griffith Rubber Mills (1969, DC Or.) 300 F. Supp. 338, cited in 12 ALR Fed. 15, 122.

Individuals must be judged as individuals and not on the basis of characteristics generally attributed to racial, religious or sexual groups. Stell v. Savannah Chatham County Board of Education 333 F.2d 55, Orleans Parish School Board v. Bush 242 F.2d 156, Leah Rosenfeld v. Southern Pacific Co. 293 F. Supp. 1219.

ISSUES

There are important issues involved in this case, which deserve consideration by this Court. The chilling effect of the recited events on persons with legitimate grievances is obvious. Plaintiff, who proved her complaint of differential treatment in pay, is now an object lesson to others not to invoke the protection of the Civil Rights Act of 1964, lest they too find

themselves excluded from the professional work they have been performing and for which they are qualified. The claim of the City that a court can authorize prospective discrimination needs to be struck down by this Court unequivocally. Promotional systems which are clearly biased and unfair should not be tolerated. To claim a technical compliance with the law on the basis of permitting application for promotion, when the appointing authority has declared in advance that he has strong prejudices against appointing or promoting women to the position involved, should not be condoned or permitted.

Without reasonable application and enforcement, the stated protections and guarantees of the Civil Rights Act of 1964, as amended, have little meaning. This Act affects many millions of persons in the labor force of our nation. A clear judicial statement interpreting the language and the legislative intent of this law is vitally necessary, if the stated goal of the Act, equal treatment and equal opportunity, regardless of sex, is to be achieved.

It appears that the long and substantial line of decisions on promotion and demotion practices, as applied to sex discrimination, has not been applied here. Promotion and demotion, EEOC Decision No. 70-920 (1970) CCH EPG para. 6156 (involving comparisons of promotion rates for males and females with similar seniority), Le Blanc v. Southern Bell Tel. & Tel. Co. (1971, DC La.)

333 F. Supp. 602. Directly in point is EEOC Decision No. 71-2338 (1971) CCH Employment Practices Guide, para. 6247. There, as here in the Howland case, the female employee's personnel file indicated that she was considered to be an above average employee. In both instances her supervisor recommended that she be promoted to the position, but the employer insisted that a man be placed in the job. The Commission found a violation of Title VII of the Civil Rights Act of 1964. (In the instant case, Mrs. Howland had already worked at the job for five years but without the classification or pay.)

In its sex discrimination guidelines, 29 C.F.R., para. 1604.2(a), the Equal Employment Opportunity Commission determines that maintaining separate lines of progression based on sex, such as was admitted in the instant case, is an unlawful employment practice in the absence of a bona fide occupational qualification. There cannot be a "male" line of progression from which females are excluded as was, and is, the practice of defendants.

CONCLUSION

It is rare to find a case where sexual prejudices are admitted so candidly and openly as is the case here. For this additional reason, consideration of this case will permit a clear and direct evaluation of the question of whether the employment and promotion programs and criteria are fair and whether prospective discrimination can

be defended on the ground of res judicata.

For these reasons, a writ of certiorari should issue to review the judgment and opinion of the United States Court of Appeals for the Ninth Circuit.

Respectfully submitted,

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EXHIBIT "A"

DO NOT PUBLISH

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

FERN HOWLAND, MATTIE STOREY, JEANNE AMODT, ROSALIE ROE and CONSTANCE PEREZ, Plaintiffs-Appellants, vs. CITY OF MONTEREY, et al., Defendants-Appellees.	No. 74-3145 MEMORANDUM

[June 11, 1976]

Appeal from the United States District Court for the Northern District of California

Before: SMITH,* BROWNING and WALLACE Circuit Judges.

Five female employees of the Monterey, California, Police Department (employees) brought this action under Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. §§2000e et sec., and the due process and equal protection clauses of the Fourteenth Amendment against City of

*Honorable J. Joseph Smith, Senior United States Circuit Judge, Second Circuit, sitting by designation.

Monterey and certain of its officials (City). The employees claim that certain employment practices of the City are unlawfully discriminatory on the basis of sex. After trial to the court without a jury, judgment was entered for the City. The employees appealed and we affirm.

I. Factual and Procedural Background

Four of the five employees are classified as "Clerk-Matrons" and spend the bulk of their time at clerical duties and some time booking and handling female prisoners. The City also employs "Detention Officers" who perform some clerical tasks and handle male prisoners. Detention officers spend substantially more of their time with prisoners and are paid more than Clerk-Matrons.

The other employee, Howland, is classified as a "Policewoman-Clerk." For about five years prior to December 1972 she worked in the Investigative Division under the supervision of a male detective. Her duties were to investigate misdemeanor bad check, innkeeper's fraud, and similar cases, to compile reports on pawn shops, and to operate a photographic darkroom. The bulk of these duties involved routine paperwork. Unlike all but one of the men in the detective division, she did not do field investigations of serious felonies. The men in the division were classified as "Patrolman," "Detective" or "Sergeant" and all were paid more than Howland.[1]

[1]Whenever the technical pay classification of the Investigative Division employees is not relevant to the discussion, we will refer to them as "detectives."

In October 1971 the employees filed a complaint with the California Fair Employment Practices Commission (FEPC). See Cal. Labor Code §§1410 et seq. The Clerk-Matrons and Howland claimed that their duties were substantially similar to those of the male Detention Officers and detectives and that they therefore should be reclassified and paid the higher salaries of those positions.

On June 9, 1972, the employees brought suit on essentially the same claims in the state court. Judgment was entered in the employees' favor on October 25, 1972. It required that the City end all sex discrimination in the hiring of Detention Officers, Patrolmen and Detectives. It did not order that the employees be reclassified but did require that the Clerk-Matrons be paid at the same rate as Detention Officers for the actual time spent handling prisoners and that Howland be paid at the same rate as a Patrolman until such time as she might be reassigned or reclassified. The court's findings specifically authorized the City to reassign Howland to duties commensurate with her Policewoman-Clerk classification.

The City undertook to reassign Howland immediately, but she viewed the reassignment as a demotion and moved to enjoin it. Her motion was denied on November 17, 1972. Howland thereafter commenced an independent state court action to enjoin the reassignment. Summary judgment was granted in favor of the City on December 27, 1972.

Both state court judgments were affirmed on appeal in an unpublished opinion on October 18, 1974.

While the state appeals were pending, the employees filed complaints with the Equal Employment Opportunity Commission (EEOC). Notices of right to sue were issued on March 26, 1973, see 42 U.S.C. §2000e-5(f)(1), and the employees instituted this action in the district court on June 22, 1973. Their complaint essentially realleged the claims made in the state court: that the Clerk-Matrons and Howland performed the same duties as the male Detention Officers and detectives for less pay and that the positions of Detention Officer and detective are not open to women. The complaint also alleged that the employees had "been subjected to retaliatory acts of retribution" because of their previous complaints of discrimination.

The City moved for summary judgment on the ground that these claims had already been litigated in the state court action and that relitigation was barred by res judicata. The district court denied the motion because the employees claimed that new acts of discrimination had occurred after the state court judgment. At trial, the employees attempted to establish several such acts. The district court entered judgment for the City. It held that to the extent that the issues had been litigated in the state court actions, the employees' claims were barred by res judicata. It further found that the employees had failed to carry their burden to prove that the alleged subsequent acts were discriminatory.

On this appeal, the employees claim first that res judicata does not bar their claims that acts subsequent to the state judgment were discriminatory and second that the court's findings that the specified acts and practices were not discriminatory are clearly erroneous.

Although no case appears to have decided the precise issue suggested by this case, that is, whether the judgment of a state court after a plenary trial bars a subsequent Title VII action, we need not decide that issue here. It appears from the employees' complaint that they may have originally intended to relitigate the matters adjudicated in the state court, but their brief on appeal clearly indicates that they have now abandoned any such intention. The only contention which they advance here with respect to res judicata is that the doctrine does not bar litigation of claims that acts and practices subsequent to the state court judgment are discriminatory. The City does not dispute this contention. Thus we turn to the merits of the employees' claims of subsequent discrimination.

II. Alleged Discriminatory Acts

The employees have alleged a number of discriminatory acts, some pertaining to the Clerk-Matrons, some to Howland. We shall discuss them separately.

A. Clerk-Matrons

The employees allege that they were not informed of the written examinations to be given for the position of Detention Officer even though the City knew they were

interested. The evidence showed that they were not given personal notice of the examinations, but that the City followed its usual practice of posting a notice on a bulletin board. The Clerk-Matrons do not claim that they did not see the notice. One of them actually took the test (she failed). Another testified that she did not apply for the position because the police chief had testified at the state trial that he did not consider any woman qualified to be a Detention Officer. Presumably she knew that the state court ordered the City to cease discrimination in hiring. There was no evidence of any acts of the Chief to discourage the Clerk-Matrons from seeking position as Detention Officers subsequent to the state judgment. The trial court's findings of no discrimination are not clearly erroneous.

The employees claim that one written examination given for the Detention Officer position was discriminatory. The city official who administers the examinations testified that the one given in January 1973 included questions dealing with specific arrest practices and was thus unfair to persons with no law enforcement experience. The Clerk-Matrons all had law enforcement experience and therefore were the beneficiaries and not the victims of the unfairness. There was no evidence that the test discriminated on the basis of sex.

The final claim pertaining to the Clerk-Matrons is that Chief Benadom has the de facto power of appointment of all police department personnel and is

steadfastly opposed to employing women as Detention Officers. The evidence indeed showed that Benadom is strongly opposed to hiring women for that position but that his personal beliefs have not prevented him from carying out the state court's order to cease discrimination. The Chief offered the first Detention Officer opening after the state court judgment to two women. One could not be located and the other had accepted the offer of another law enforcement agency. There was no evidence that the City's present employment practices are discriminatory.

B. Howland

The more substantial claims of discrimination pertain to Howland. She claims first that she was refused a promotion to Patrol Sergeant on the basis of her sex and prior complaints. The position required a year's experience on patrol, which she lacked. She does not challenge this requirement as unlawful. She was allowed to compete for the position because the notice inadvertently omitted mentioning the requirement. Howland passed the written test and was invited to an oral interview. She claims that the interview grading procedure was discriminatory in that the interviewers consisted of Chief Benadom and others selected by him, that he has a strong prejudice against her and gave her a much lower rating than the other interviewers.

The evidence showed that the interview board consisted of five people selected by the City's personnel officer. All but Chief Benadom were from outside the police department and three were from outside the city administration. One was a woman.

Chief Benadom testified that he gave Howland low ratings because on the basis of his having been her direct supervisor for 14 years he felt she did not have the physical or emotional qualities required for the job. Only one of the other interviewers rated Howland qualified in all significant respects.

Howland also claims that her transfer from the detective division to non-police duties was a "demotion" in retribution for her having complained of sex discrimination. Extensive testimony was given on both sides of this issue. The district judge found that the reassignment "was entirely consistent with [her] abilities, training, and experience," and that "[t]here was no showing that she was the victim of any discrimination." We cannot say that these findings are clearly erroneous.

AFFIRMED.

EXHIBIT "B"

42 U.S.C.A., §2000(e)(2) provides in pertinent part:

"(a) Employer Practices

It shall be an unlawful employment practice for an employer...

(2) to limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race, color, religion, sex, or national origin." (Emphasis added.)

CERTIFICATE OF SERVICE

I hereby certify that on this 7th day of December, 1976, copies of the Petition for Writ of Certiorari were mailed, postage prepaid, to the following:

William C. Marsh, Esq.
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City of Monterey, a public body, corporate and politic, et al.,

Respondents.

Brief In Opposition To The Petition For Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

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QUESTION PRESENTED

The sole question presented is whether the Court of Appeals properly held that the findings of fact of the District Court were not clearly erroneous.

STATEMENT OF THE CASE

The procedural and factual background of this matter is fairly presented in the unpublished opinion of the Court of Appeals dated June 11, 1976, a copy of which is attached as Exhibit A to the Petition herein.

REASONS WHY THE WRIT SHOULD NOT BE GRANTED

Contrary to petitoners' assertions none of the questions presented by petitioners is involved in this petition. The petition

actually seeks to do no more than relitigate factual determinations made by the District Court and held to be not clearly erroneous by the Court of Appeals. No substantial issues of law are presented for the determination of this Court.

Petitioners assert that the questions presented are:

1. Does the judgment of a State Court after a plenary trial bar a subsequent Title VII action?

2. Does res judicata bar claims of discrimination for acts subsequent to a State Judgment?

3. Does an employment system which denies a woman the opportunity for promotion by reason of lack of experience, which she has been denied as a condition of her employment, violate the requirements of Title VII?

The question of whether a state court judgment after a plenary trial may

bar a subsequent Title VII action was abandoned by petitioners in the Court of Appeals. See Opinion of the Court of Appeals, Exhibit A to the Petition at 15. Respondents have conceded that res judicata does not bar claims of discrimination for acts subsequent to a state court judgment. See Exhibit A to the Petition at 15.

Finally, Petitioners' third question similarly is not present in this case. The opinion of the Court of Appeals correctly points out that petitioner Howland was given an opportunity to take the examination for the position of Patrol Sergeant and was given an oral interview by a board consisting of five people selected by the City's personnel officer. Four members of the board were from outside the police department and three were

from outside the city administration. Only one member of the board rated petitioner Howland qualified in all significant respects. As a result, although her name was placed on the list of eligible applicants, petitioner ultimately was not selected for the job. Exhibit A to the Petition at 18.

The repeated suggestion that the City's chief of police unlawfully discriminated against petitioners raises a question of fact, not law. The factual questions were resolved in every instance against petitioners by the district court and those findings were upheld on appeal. No purpose would be served by this Court again reviewing these findings.

CONCLUSION

This case is of so little substance that the court below chose to deal with it

in an unpublished opinion. None of the considerations governing the grant of a writ of certiorari set forth in Rule 19 of the Supreme Court Rules, or any other substantial question of law or equity, is present. Respondents respectfully submit that the petition herein should be denied.

Dated: January 5, 1977.

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